Supreme Court, U.S.
FILED

951471 MAR 14 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MARTA M. MOTLEY,

Petitioner,

vs.

MARATHON OIL COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK HAMMONS
Attorney for Petitioner
401 N. Hudson, Lower Level
Oklahoma City, OK 73102
(405) 235-6100 (Fax: 235-6111)

March 14, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the attorney-client privilege, as it exists under the federal common-law, shield from disclosure an attorney's actions in planning the commission of a civil tort?

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes and Constitutional Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	8

TABLE OF AUTHORITIES

Page

CASES CITED:

- Supreme Court -

CFCT v. Weintraub, 471 U.S. 343 (1985) 6

United States v. Zolin, 491 U.S. 554 (1989) 5, 6

- Circuit Court -

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir.1977) 7

In Re Grand Jury Investigation, 599 F.2d 1224 (3d Cir.1979) 7

In Re Grand Jury Proceedings, 689 F.2d 1351 (11th Cir.1982) 7

In Re Grand Jury Proceedings, 727 F.2d 1352 (4th Cir.1984) 7

In Re Sealed Case, 737 F.2d 94 (D.C.Cir.1984)..... 7

Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir.1994) 7

United States v. Fortna, 796 F.2d 724 (5th Cir.1986) 7

- District Court Cases -

United States v. United Shoe Machinery Corp., 89 F.Supp. 357 (D.Mass.1950) 6, 7

OTHER AUTHORITIES:

8 Wigmore, Evidence § 2298, p 573 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Marta M. Motley respectfully prays that a Writ of Certiorari be issued to review the Dec. 15, 1995, Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on Dec. 15, 1995, is reprinted as Appendix "A" hereto.

The official citation for the opinion of the Tenth Circuit in this case is: *Motley v. Marathon Oil Co.*, ___ F.3d ___ (10th Cir.1995).

The Order of the United States District Court for the Western District of Oklahoma entered on Oct. 7, 1994, denying Plaintiff's motion to compel discovery is reprinted as Appendix "B" hereto. There is no official citation for the District Court's Order.

The Order of the United States District Court for the Western District of Oklahoma entered on Oct. 21, 1994, denying Plaintiff's request to reconsider denial of her motion to compel is reprinted as Appendix "C" hereto. There is no official citation for the District Court Order.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on Dec. 15,

1995. No Petition for Rehearing was filed. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The original action filed in the United States District Court for the Western District of Oklahoma was for discrimination based on race (caucasian – "reverse" discrimination) as precluded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, inter alia. Jurisdiction was vested in the district court pursuant to 42 U.S.C. § 2000e-5(f)(3). The judgment entered disposed of the entire action wherefore the order was final and appealable of right pursuant to 28 U.S.C. § 1291 and 42 U.S.C. § 2000e-5(j). The appeal was perfected in accordance with Rule 4(a), FRAP.

STATUTES AND CONSTITUTIONAL PROVISIONS

The issues arise within the context of the federal common-law recognition of an attorney-client privilege and related to the scope of that privilege.

As a consequence, there are no statutes or constitutional provisions at issue in this appeal.

STATEMENT OF THE CASE

The Petitioner is Marta Motley, a person employed by Marathon Oil Co. and who was discharged as part of a claimed reduction in force.

This action was brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 based on racial discrimination in employment.

Ms. Motley filed her lawsuit and, in connection therewith, issued a timely request for discovery of certain restructuring guidelines and notes regarding the activities of the Restructuring Oversight Committee (ROC) which had made the challenged employment decisions. Marathon refused to produce such documents claiming attorney-client and work product privilege. Ms. Motley filed a motion to compel such discovery claiming that Marathon had failed to establish that the documents were anything other than business reports and, even if a privilege were otherwise established, there was evidence sufficient to make a prima facie showing that the attorney was engaged in planning an intentional tort such that the privilege was not applicable. Ms. Motley urged that the ROC's intention and its selection process was central to the issue of discriminatory intent and this discovery was crucial to a fair trial. Ms. Motley requested the trial court to conduct an **in camera** inspection and, thereupon to compel discovery. Marathon did not contest the existence of a prima facie case of an intention to commit an intentional tort of discrimination, but rather argued that the "crime-fraud" exception to the attorney-client privilege did not extend to intentional torts.

The trial court did not conduct an **in camera** inspection of the documents. Rather the court simply ruled that – as a matter of law – an attorney's involvement in planning an intentional tort was shielded by the attorney-client privilege. Ms. Motley's request that the Court reconsider this ruling was denied.

A jury trial was conducted and a defense verdict entered.

Ms. Motley appealed on the basis that the denial of discovery was erroneous and prejudicial both by denying her access to relevant information and by denying her the ability to effectively challenge late-developing explanations offered by Marathon for the exercise of its business judgment.

The Tenth Circuit affirmed the judgment finding as a matter of law that the information sought was privileged because "we have not extended the [exception to the] privilege to torts generally. Instead, we have construed the exception as providing that '[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud.' " Slip Opinion, p. 6; internal citations omitted.

It is from this holding that, Petitioner seeks review by this Court.

REASONS FOR GRANTING THE WRIT

The reasons for granting review of the decision of the Court of Appeals for the Tenth Circuit are as follows:

A) The Court of Appeals for the Tenth Circuit has decided an important question of federal law in a way that apparently conflicts with applicable decisions of this Court and has directly addressed an important question as to the scope of attorney-client privilege which has not been addressed by this Court and which should be settled by this Court. The question to be decided is whether this Court's decision in *United States v. Zolin*, 491 U.S. 554 (1989) which excludes the planning of future wrongdoing from the scope of the attorney-client privilege is limited to the future planning of crimes and frauds or includes the future planning of crimes *and torts*.

B) The decision of the Tenth Circuit creates a split in the circuits. By expressly rejecting a "crime-tort" exception to the attorney-client communication privilege, the Tenth Circuit has rejected the most commonly cited formulation of the attorney-client privilege which excludes the planning or commission of a "crime or *tort*" from the privilege and which creates a split among the Circuits on this issue.

One question is presented in this petition:

1. Is an attorney's participation with his client in the future planning of a tort shielded by the attorney-client privilege?

In answering this question in the affirmative, the Tenth Circuit appears to have reached a decision in conflict with the implicit – if not express – holdings of this Court and further has reached a decision which creates a split in authority between the circuits.

Such decision appears to conflict with the decision in *CFCT v. Weintraub*, 471 U.S. 343, 354, 85 L.Ed.2d 372, 381 (1985) where this Court accepted without disagreement the party's statement that "the corporation's attorney-client privilege . . . does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, *and ordinary torts*". Emphasis supplied.

Such decision also appears to conflict with the holding in *United States v. Zolin*, 491 U.S. at 556, 105 L.Ed.2d at 481 which clarified that the designation "crime-fraud exception" is merely a shorthand designation for the exception and not an exclusive listing of the grounds for waiving the privilege. "[T]he generally recognized exception to th[e] [attorney-client] privilege [applies to] communications in furtherance of *future illegal conduct* – the so-called 'crime-fraud' exception." *Id.*, emphasis supplied.

This Court in *Zolin* cited with approval 8 Wigmore, Evidence § 2298, p. 573 (491 U.S. at 562-63) and, in turn, this comment from Wigmore has led most federal courts to conclude that an attorney's participation in planning a tort could not be privileged.

Thus, the Tenth Circuit's Opinion appears to conflict with the implicit – if not explicit – statements of this Court regarding the scope of attorney-client privilege and the exceptions thereto.

Furthermore, this decision rejects the most commonly cited formulation of the attorney-client privilege, to wit: *United States v. United Shoe Machinery Corp.*, 89 F.Supp.

357, 358-59 (D.Mass.1950) which uses a "crime-tort" standard in determining whether a communication is privileged. It is the *United Shoe* "crime-tort" standard which the overwhelming majority of other Circuits have adopted. *See In Re Sealed Case*, 737 F.2d 94, 98-99 (D.C.Cir.1984) (adopting *United States v. United Shoe* "crime or tort" formulation), *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir.1994) ("crime or tort" standard), *In Re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir.1984) (the attorney-client "applies only when the person claiming the privilege has as a client consulted an attorney for the purpose of securing a legal opinion or services and not 'for the purpose of committing a crime *or tort*'" emphasis supplied), *In Re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir.1979) ("Perhaps the most commonly cited formulation of the attorney-client privilege is that offered by Judge Wyzanki in *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D.Mass.1950)" which excludes crimes or torts), *United States v. Fortna*, 796 F.2d 724, 729-30 n. 4 (5th Cir.1986) (*United Shoe* "crime or tort" formulation), *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir.1977) ("frequently cited case of *United States v. United Shoe Machinery*"), and *In Re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir.1982) ("The attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice, not for the purpose of committing a crime or a tort.").

CONCLUSION

The scope of the attorney-client privilege is a matter of important public policy and far-ranging consequence. This Court should accept this Petition to provide a definitive statement of whether the privilege encompasses an attorney's assistance in planning a tort and to resolve the split in the circuits which the Tenth Circuit decision has created.

Respectfully submitted this 14th day of March, 1996.

MARK HAMMONS
Attorney for Petitioner

APPENDIX

A. Order and Judgment of the United States Court of Appeals for the Tenth Circuit..... A1

B. Order of the District Court Denying Plaintiff's Motion to Compel Discovery (Oct. 7, 1994)..... B1

C. Order of the District Court Denying Plaintiff's Request To Reconsider Order Denying Discovery (Oct. 21, 1994)..... C1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARTA M. MOTLEY, Plaintiff-Appellant, v. MARATHON OIL COMPANY, Defendant-Appellee.	)))))))	No. 95-6014 (Filed Dec. 15, 1995)

Appeal from the United States District Court
for the Western District of Oklahoma
D.C. No. CIV-93-2097-R

Mark Hammons, Hammons & Associates, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Carolyn G. Hill, (Shelia D. Tims and Lynn O. Holloman, with her on the brief) Andrews, Davis, Legg, Bixler, Milsten & Prince, Oklahoma City, Oklahoma, for the Defendant-Appellee.

Before TACHA, LOGAN, REAVLEY,* Circuit Judges.

REAVLEY, Circuit Judge

---

* The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

Marta Motley was laid off as part of a reduction in force by her employer, Marathon Oil Company. Motley, who is white, sued Marathon, claiming that Marathon discriminated against her on account of her race, in violation of federal and state law. The jury returned a verdict in favor of Marathon, and the district court entered a take-nothing judgment against Motley. Motley appeals, complaining of district court discovery and evidentiary rulings. We affirm.

BACKGROUND

In 1992 Marathon decided that a nationwide reduction in force was necessary. A company restructuring oversight committee (ROC or Committee) was involved in the layoffs. Marathon presented evidence at trial that Motley had been employed as a "contracts analyst" at the Oklahoma City office, and that Marathon decided that this office did not need a contracts analyst because there was not enough work to justify the position. Motley's position was eliminated after she was terminated. Marathon's evidence was that it did not terminate any employees whose job positions were not to be eliminated.

Motley offered evidence that the company considered "EEO reasons" or "EEO purposes" in making its termination decisions. For example, her supervisor, Don Morrison, who testified on her behalf, stated in a memorandum that "even [Morrison's supervisor] has indicated that [Motley] shouldn't have been on the final list and wouldn't have been if it hadn't been for human resources in Houston insisting that the two black women who were subpar performers stay off the list for EEO

reasons." She claims that Ronald Becker, the regional manager, was instructed to remove a number of minority employees from lists of employees to be terminated, and that these minority employees were replaced with non-minority employees on the lists. Marathon countered that the four minority employees initially placed on a termination list were removed from the list because Marathon decided that their jobs were not to be eliminated. Marathon's witnesses also said that the lists where names were substituted were lists of "nonexempt" employees, and that Motley was an "exempt" employee. Exempt employees are not paid overtime and operate with less supervision than nonexempt employees.

DISCUSSION

I. *Discovery Ruling*

John Miller, an in-house attorney for Marathon, advised the company regarding the reduction in force. Marathon prepared a privileged document log. One document was described as a "[d]raft of a May 21, 1992, memo from the Law Department on proposed guidelines for implementation of involuntary terminations." Another was described as "[l]ists prepared at the request of John Miller, attorney, which he used to advise the [ROC]." Motley moved to compel the production of these documents, arguing that they were not privileged because they were prepared in the ordinary course of business and not for the purpose of giving legal advice, and because they fell within the crime-fraud exception to the attorney-client privilege. Motley also argued that Marathon had waived the privilege. Miller's deposition

was taken, and he also filed an affidavit in opposition to the motion to compel. With the benefit of the affidavit, the Morrison memorandum, the deposition of Miller and portions of Becker's deposition, as well as other materials, all of which were before the court, the court denied the motion to compel. The district court did not, however, conduct an *in camera* inspection of the documents as Motley requested.

Our analysis begins with basic principles. The party seeking to assert a privilege has the burden of establishing its applicability. *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985). Generally, "[c]ontrol of discovery is entrusted to the sound discretion of the trial courts, and a denial of a motion to compel discovery will not be disturbed absent abuse of discretion." *Martinez v. Schock Transfer and Warehouse Co.*, 789 F.2d 848, 850 (10th Cir. 1986).

Motley argues that the documents are not protected by the attorney-client privilege because Marathon failed to show that they were prepared for the purpose of giving legal advice rather than for business purposes. We agree with Motley that the mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege. However, Miller stated by affidavit that he prepared the draft memorandum and that it contained legal advice for the corporate restructuring of Marathon. He also stated that the lists in question "were prepared for my use in giving legal advice to the [ROC]," that the memorandum and lists were treated as confidential documents, and that "I did not render business advice in the

Memorandum and Lists." He further testified at his deposition that he served in the capacity of a legal advisor to the Committee. Motley offered no evidence directly contradicting these statements. We cannot say that the district court abused its discretion in concluding that the communications in issue were for the purpose of providing legal rather than business advice.

Motley next argues that the documents are not protected by the attorney-client privilege because they fall within the crime-fraud exception to the privilege. As evidence in support of this argument, Motley offered to the district court the Morrison memorandum discussed above. She also presented notes prepared by Becker, Becker's deposition testimony, an interrogatory answer (discussed in more detail below), and the affidavit of her own counsel, all of which she claimed showed that Marathon engaged in racial discrimination when it effected its reduction in force.

Motley argues that illegal racial discrimination is a tort and that the crime-fraud exception is not limited to crime and fraud, but extends to attorney communications made in furtherance of the commission of a tort. While Motley cites some authority in support of this argument,[1] we have not extended the privilege to torts generally. Instead, we have construed the exception as providing that "[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud." *In re Grand Jury Proceedings*, 857 F.2d 710, 712

---

[1] *See* 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5501 at 518 (1986).

(10th Cir. 1988), *cert. denied*, 492 U. 905 (1989); *accord, In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983). Motley asserted both federal and state causes of action. As to state causes of action, a federal court should look to state law in deciding privilege questions. FED. R. EVID. 501; *White v. American Airlines, Inc.*, 915 F.2d 1414, 1424 (10th Cir. 1990). We have held that "some type of prima facie showing of a crime or fraud is required under Oklahoma law in order to trigger the applicability of the crime-fraud exception." *Id.*

The party claiming that the crime-fraud exception applies must present prima facie evidence that the allegation of attorney participation in crime or fraud has some foundation in fact. *Vargas*, 723 F.2d at 1467. The determination of whether such a prima facie showing has been made is left to the sound discretion of the district court. *Id.; In re Grand Jury Proceedings*, 727 F.2d 941, 946 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984). Here we find no abuse of discretion by the district court. Motley at most offered some evidence of race-based decisions by Marathon when it carried out the reduction in force. Motley offered no evidence that the two documents in issue were prepared in furtherance of a crime or fraud.

Motley separately complains that, in finding the crime-fraud exception inapplicable, the district court did not conduct an *in camera* review of the documents in issue. In *United States v. Zolin*, 491 U.S. 554 (1989), the Supreme Court held that a district court may conduct an *in camera* review to determine the applicability of the crime-fraud exception, but only if the party requesting such a review makes a showing of a factual basis adequate to support a good faith belief by a reasonable

person that *in camera* review of the documents may reveal evidence to establish that the crime-fraud exception applies. *Id.* at 572, 575-76. Whether to conduct an *in camera* review is left to the sound discretion of the district court. *Id.* at 572. As explained above, Motley at most made a showing of race-based decisions by Marathon in carrying out the reduction in force. Since the court correctly ruled that the crime-fraud exception does not extend to tortious conduct generally, but is limited to attorney advice in furtherance of a crime or fraud, for the reasons stated above the court did not abuse its discretion in denying the request for an *in camera* review of the documents.

Motley argues that Marathon waived the attorney-client privilege, for two reasons. She argues that Marathon waived the privilege by failing to assert it timely, pointing out that Marathon failed to comply with a local rule requiring the tender of a privileged document log by or prior to the status conference. Marathon points out that (1) suit was filed in November of 1993 and Motley did not begin discovery until July 5, 1994, 58 days before the discovery cutoff, and (2) Marathon's counsel disclosed the identity of the two disputed documents on August 1, 1994, as soon as she learned that they existed and four months before trial. In these circumstance we cannot say that the district court abused its discretion by failing to order the production of otherwise privileged documents due to the timeliness of the assertion of the privilege. We are particularly loath to find that a district court abused its discretion with a decision regarding the enforcement of its own local rules.

Motley also claims that Marathon waived the privilege by relying on advice of counsel "as an explanation for the employment actions in question," and using attorney-client communication "as both as a sword and a shield." Motley relies on the following conduct of Marathon. In one interrogatory answer, Marathon stated that Becker made certain changes, which were recommended by the ROC "upon advice of counsel," to a list of employees to be terminated. The employees in question were "Records Processors," and did not hold Motley's "Contracts Analyst" position. Becker testified in his deposition that changes were made on one list because his boss told him to do so "for legal and business purpose reasons." Marathon designated Miller, an in-house lawyer, as its representative to testify in a deposition noticed to discover the activities, functions and decisions of the ROC.

To be sure, there is some authority that attorney-client communications cannot be used both as a sword and a shield[2], as when a party defends the conduct which is the subject of the suit by relying on advice of counsel. Here, however, Marathon did not attempt to justify its termination of Motley on the basis of advice of counsel. It did not claim that Motley was terminated because of a recommendation of counsel; instead, it defended its decision, which was part of a company-wide reduction in force, based on a lack of sufficient work to justify the position Motley held. Further, the mere fact that it designated a lawyer, pursuant to FED. R. CIV. P. 30(b)(6), as its

---

[2] *E.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

corporate representative at one deposition, is a wholly insufficient ground to hold that Marathon waived its attorney-client privilege. Although Miller's counsel did state at the deposition that he would not allow questions regarding the two privileged documents, Miller did not otherwise assert the privilege a single time at his deposition. Further, although Miller's memory regarding the ROC was far from perfect, we agree with the district court that "lack of memory . . . is not the same as the assertion of the attorney-client privilege." Motley could have deposed the members of the ROC if she had timely attempted to do so. Motley did file a motion to extend the discovery cutoff to allow her to depose a member of the ROC, but does not appeal the district court's denial of that motion.

II. *Evidentiary Ruling*

Motley complains of a single evidentiary ruling by the district court. The court allowed Becker to testify about his understanding of a policy of the Committee. Specifically, he testified on direct examination that based on his review of Miller's deposition, the Committee did not permit the termination of an employee unless that employee's position was to be eliminated and no replacement was to be hired. Motley objected on grounds that the witness was attempting to characterize the testimony from the deposition, and that the deposition itself was the best evidence of the Committee's policy. She also complains on appeal that the testimony was not based on personal knowledge, and that a lay witness cannot rely on hearsay in order to offer an opinion as to another's motive.

The district court has broad discretion in determining the competency of a witness to testify, and its decision will not be reversed absent an abuse of discretion. *United States v. Gomez*, 807 F.2d 1523, 1527 (10th Cir. 1986). Further, under FED. R. EVID. 103(a), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . . " Even assuming that the court erred in allowing the testimony, Motley does not establish that her substantial rights were affected. Miller's deposition testimony, on which Becker based his testimony, had already been read to the jury, and Becker in fact gave an accurate characterization of Miller's testimony.[3] Further, on cross-examination Motley's counsel revisited the subject of what Becker knew about Marathon's policy of not terminating employees whose jobs were not to be eliminated. Becker's testimony was merely cumulative of other testimony the jury heard. *See Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1332 (10th Cir. 1984) (admission of soil report over hearsay and foundation objections did not affect party's substantial rights under Rule 103(a) where such "documentary evidence was, at worst, cumulative.").

AFFIRMED.

---

[3] Miller testified by deposition: "As I told you, no one would be terminated if he or she would be – were to be replaced. So if you were white, black, male or female, it didn't matter. If you were going to be replaced, you could not be terminated." Becker testified that, based on his review of Miller's deposition, "what I learned was that [the] oversight committee would not permit us to terminate or let go anybody who was in a job that we weren't eliminating. . . . "

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARTA MOTLEY, Plaintiff, v. MARATHON OIL COMPANY, Defendant.	)	CIV-93-2097-R (Filed Oct. 7, 1994)

ORDER

Before the Court is Plaintiff's motion to compel production and disclosure of two documents listed on Defendant's privilege log, specifically 1) a draft of a May 21, 1992 memo from the Law Department on proposed guidelines for implementation of involuntary terminations; and 2) lists prepared at the request of John Miller, attorney, which he used to advise the Restructuring Oversight Committee.

Plaintiff contends that the crime-fraud exception to the attorney-client privilege applies to permit or require at least *in camera* inspection of the documents and/or production thereof; that the communications involved business advice and business decisions, not legal advice, by reason of which the attorney-client privilege does not apply; and that Defendant waived any claim of privilege by placing the advice of its attorney at issue as an explanation for the employment actions in question and by designating its corporate counsel as corporate representative for deposition as to the activities of the Restructuring Oversight Committee.

Plaintiff's motion to compel is denied. The Tenth Circuit has not to date extended the crime-fraud exception to the attorney-client privilege, for communications made to further a crime or fraud, to communications made to further or plan the commission of a tort. *See In re Grand Jury Proceedings*, 857 F.2d 710 (10th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3214, 106 L.Ed.2d 565 (1989); *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983). It appears to the Court that the documents are, or were prepared for the purpose of giving, legal advice. Plaintiff has not shown that the advice given was primarily business, rather than legal, advice. *See e.g., United States v. Davis*, 132 F.R.D. 12, 16 (S.D.N.Y. 1990). No waiver of the attorney-client privilege has been shown nor can a waiver reasonably be inferred. The Court agrees with Plaintiff that the attorney-client privilege does not and cannot shield the actions of the Restructuring Oversight Committee and that Plaintiff is entitled to ask whether the Committee applied a race-related standard in making its decisions and to obtain that information without any claim of privilege. The claim of a lack of memory, however, is not the same as the assertion of the attorney-client privilege.

Plaintiff's motion to compel production is DENIED.

IT IS SO ORDERED this 7th day of October, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARTA MOTLEY,	)	
Plaintiff,	)	
	)	CIV-93-2097-R
v.	)	
	)	(Filed
MARATHON OIL COMPANY,	)	Oct. 21, 1994)
	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff's application to reconsider this Court's Order of October 7, 1994. Plaintiff requests reconsideration because she believes the Court overlooked the case of *CFCT v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985) cited by Plaintiff in support of her motion to compel which was the subject of this Court's Order of October 7, 1994.

The Court did not cite *Weintraub* nor specifically state that *Weintraub* is not dispositive or even persuasive because of time constraints posed by the volume of motions now pending in this Court and because it is so readily apparent that in *Weintraub* the Supreme Court did not hold that the crime-fraud exception to the attorney-client privilege applies to the planning or commission of ordinary torts. The quotation from *Weintraub* upon which Plaintiff relies is as follows:

> *Respondents contend* that the trustee can adequately investigate fraud without controlling the corporation's attorney-client privilege. *They point out* that the privilege does not shield the disclosure of communications relating to the planning or commission of *ongoing fraud, crimes,*

> *and ordinary torts*, see, e.g., *Clark v. United States*, 289 US 1, 15, 77 L Ed 993, 53 S Ct 465 (1993); *Garner v. Wolfinbarger*, 430 F2d 1093, 1102-1103 (CA5 1970), cert denied, 401 US 974, 28 L Ed 2d 323, 91 S Ct 1191 (1971). *Brief for Respondents* 11.
>
> 471 U.S. at 354, 105 S. Ct. at ___, 85 L. Ed. 2d at 381-82. (emphasis added)

The cases cited by the respondents in *Weintraub* both involve the crime-fraud exception and no mention was made therein of any extension of the exception to the planning or commission of torts. The allegations in *Weintraub* clearly raised the issue of fraud.

Similarly, another Supreme Court case cited by the Plaintiff in support of her motion to compel for the proposition that the crime-fraud exception to the attorney-client privilege extends to torts merely quoted the statement in J. Wigmore, *Evidence* §2298, p. 573, that the attorney-client privilege "cease[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin*, 491 U.S. 554, 562-63, 109 S. Ct. 2619, ___, 105 L. Ed. 2d 469, 485 (1989). The issue in *Zolin* was not whether the crime-fraud exception to the privilege should extend to communications concerning future wrongdoing but the evidentiary showing required for an *in camera* review of materials claimed to be protected by the attorney-client privilege by a party asserting that the crime-fraud exception applies.

This Court, in previously conducting its own independent research on the issue, has found no Supreme Court or Tenth Circuit case holding that the crime-fraud

exception to the attorney-client privilege extends to communications relating to the planning or commission of ordinary torts. Counsel for Plaintiff has cited none. Plaintiff's motion for reconsideration is denied.

IT IS SO ORDERED this 21st day of October, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 12 1996
CLERK

No. 95-1471

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MARTA M. MOTLEY,
Petitioner,

v.

MARATHON OIL COMPANY,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CAROLYN GREGG HILL
Counsel of Record
SHELIA D. TIMS
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241
Attorneys for Respondent

April 12, 1996

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the crime–fraud exception to the attorney–client privilege has been expanded to include alleged torts.

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Marathon Oil Company is a wholly-owned subsidiary of USX Corporation, a Delaware corporation.

The following are subsidiaries of USX Corporation which are traded on the NYSE: USX-US Steel, USX-Marathon, USX-Delhi Gas Pipeline.

TABLE OF CONTENTS

Counterstatement Of Question Presented For Review . . . i

Lists of Parties and Parent Companies and Nonwholly Owned Subsidiaries ii

Table of Contents iii

Table of Authorities iv

Opinions Below 2

Statement of Jurisdiction 3

Statement of The Case 3

A. Course of Proceedings and Disposition of the Case Below 3

1. In The District Court 3

2. In The Court of Appeals 5

B. Correction of Misstatements in the Petition . . . 6

Reasons For Denying The Writ 8

I. There Is No Conflict With The Decisions of The Court. 8

II. There Is No Conflict Among The Circuits. 9

III. There Is No Conflict With State Law. 14

Conclusion 16

TABLE OF AUTHORITIES

Cases

Charles Woods Television Corp. v. Capital Cities/ABC, Inc., 869 F.2d 1155 (8th Cir. 1989), *cert. denied*, 493 U.S. 848, 110 S. Ct. 145, 107 L.Ed.2d 104 12

Cole v. State, 298 P. 892 (Okla. Crim. App. 1931) 15

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S. Ct. 1996 (1985) 8

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) 11

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) 11

Fausek v. White, 965 F.2d 126 (6th Cir. 1992) 12

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992) 12

Hyde Constr. Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972) 15

In re Appl'n of United States, 723 F.2d 1022 (1st Cir. 1983) 12

In re Grand Jury Investigation,
599 F.2d 1224 (3d Cir. 1979) 10

In re Grand Jury Proceedings,
689 F.2d 1351 (11th Cir. 1982) 11

In re Grand Jury Proceedings,
727 F.2d 1352 (4th Cir. 1984) 10

In re Grand Jury Proceedings,
857 F.2d 710 (10th Cir. 1988),
cert. denied, 492 U.S. 905,
109 S.Ct. 3214, 106 L.Ed.2d 565 (1989) 12

In re Sealed Case,
737 F.2d 94 (D.C. Cir. 1984) 10, 13

Keller v. Adams-Campbell Co.,
264 U.S. 314, 44 S. Ct. 356,
68 L.Ed. 705 (1924) 13

Keller v. State,
651 P.2d 1339 (Okla. Crim. App. 1982) 15

Morris v. State,
115 P. 1030 (Okla. Crim. App. 1911) 15

Motley v. Marathon Oil Co.,
71 F.3d 1547 (10th Cir. 1995) 2, 4, 5, 7, 14

Pagano v. Oroville Hospital,
145 F.R.D. 683 (E.D. Cal. 1993) 15

Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.,
32 F.3d 851 (3d Cir. 1994) 10

Sandberg v. Virginia Bankshares, Inc.,
979 F.2d 332 (4th Cir. 1992) 11

Smith v. Alice Peck Day Mem. Hospital,
148 F.R.D. 51 (D. N.H. 1993) 15

United States v. Aldridge,
484 F.2d 655 (7th Cir. 1973),
cert. denied sub nom. Good v. United States,
415 U.S. 921, 94 S. Ct. 1423, 39 L.Ed.2d 477 (1974) 12

United States v. Aucoin,
964 F.2d 1492 (5th Cir. 1992), *cert. denied*,
506 U.S. 1023, 113 S. Ct. 661, 121 L. Ed. 2d 587 . 12

United States v. De La Jara,
973 F.2d 746 (9th Cir. 1992) 11

United States v. Fortna,
796 F.2d 724 (5th Cir. 1986), *cert. denied*,
479 U.S. 950, 107 S. Ct. 437, 93 L.Ed.2d 386 10

United States v. King,
73 F.R.D. 103 (E.D. N.Y. 1976) 15

United States v. Mardian,
546 F.2d 973 (D.C. Cir. 1976) 12

United States v. Richard Roe, Inc.,
68 F.3d 38 (2d Cir. 1995) 11

United States v. United Shoe Machinery Corp.,
89 F. Supp. 357 (D. Mass. 1950) 9, 10

United States v. White,
887 F.2d 267 (D.C. Cir. 1989) 13

United States v. Zolin,
491 U.S. 554, 109 S. Ct. 2619,
105 L.Ed.2d 469 (1989) 8, 9

Wei v. Bodner,
127 F.R.D. 91 (D. N.J. 1989) 15

White v. American Airlines, Inc.,
915 F.2d 1414 (10th Cir. 1990) 14

Wisconsin Elec. Co. v. Dumore Co.,
282 U.S. 813, 51 S. Ct. 214, 75 L.Ed. 728 (1931) . 13

Statutes

28 U.S.C. § 501 14
28 U.S.C. § 1254 (1) 3
Okla. Stat. tit. 12,§ 2502 14

Rules

Supreme Court Rule 13.1 3
Supreme Court Rule 15.2 6
Fed. R. Evid. 501 13

Treatise

8 Wigmore, Evidence§ 2298,573 (1961) 13

No. 95-1471

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MARTA M. MOTLEY,
Petitioner,

v.

MARATHON OIL COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent, Marathon Oil Company, respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in No. 95-6014 filed December 15, 1995, be denied.

OPINIONS BELOW

The order of the United States Court of Appeals for the Tenth Circuit entered on Dec. 15, 1995, affirming the orders of the district court is reprinted in Petitioner's Appendix A. The official citation is *Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995).

The order of the United States District Court for the Western District of Oklahoma entered on Oct. 7, 1994, denying plaintiff's motion to compel discovery is reprinted in Petitioner's Appendix B. There is no official citation for the district court's order.

The order of the United States District Court for the Western District of Oklahoma entered on Oct. 21, 1994, denying plaintiff's request to reconsider denial of her motion to compel discovery is reprinted in Petitioner's Appendix C. There is no official citation for the district court's order.

STATEMENT OF JURISDICTION

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered on Dec. 15, 1995. No petition for rehearing was filed. The petition for writ of certiorari was filed within ninety (90) days of the order and judgment pursuant to Rule 13.1 of the Supreme Court Rules. The Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

1. In The District Court

Petitioner, Marta Motley ("Motley") sued Respondent Marathon Oil Company ("Marathon") and claimed that when Marathon reduced its workforce, it terminated her employment on account of her race, Caucasian, in violation of Title VII of the Civil Rights Act of 1964 and in violation of Oklahoma's public policy. Marathon denied her allegations and, after a three-day trial, the jury returned a verdict in favor of Marathon on both the state and federal claims.

Prior to trial, Motley sought to compel production of two documents which Marathon listed as protected by the attorney-client privilege. These documents concerned legal advice that Marathon's in-house counsel, John M. Miller ("Miller"), gave to Marathon prior to the reduction-in-force ("RIF"). The Privilege Log described the two documents as:

Draft of a May 21, 1992, memo from the Law Department on proposed guidelines for implementation of involuntary terminations, and

Lists prepared at the request of John Miller, attorney, which he used to advise the Restructuring Oversight Committee.

Motley challenged application of the privilege on several grounds. Her petition, however, is confined to her assertion that these documents were not privileged because Miller had allegedly planned, participated in or advised his client to commit a tort.

The district court reviewed Miller's deposition and his affidavit when it ruled on Motley's motion to compel production of the two privileged documents. The district court also considered the evidence Motley offered: "the Morrison memorandum . . . notes prepared by Becker, Becker's deposition testimony, an interrogatory answer . . . and affidavit of her own counsel, all of which she claimed showed that Marathon engaged in racial discrimination when it effected its reduction in force." *Motley*, 71 F.3d at 1551.

The district court ruled that the privilege was properly invoked by Marathon. The court held that the Tenth Circuit has not extended the crime-fraud exception to the attorney-client privilege to communications made to further or plan the commission of a tort. The court further held that the documents were prepared for the purpose of giving legal advice, not business advice. Furthermore, the court found that the attorney-client privilege was not waived merely by placing the advice of the attorney at issue and by designating

its house counsel as corporate representative for deposition about the activities of the Restructuring Oversight Committee ("ROC").

Motley requested that the district court reconsider the denial of her motion to compel and contended that the court overlooked federal law. The district court once again denied Motley's request for production. The court stated that in its own independent research, "found no Supreme Court or Tenth Circuit case holding that the crime–fraud exception to the attorney–client extends to communications relating to the planning or commission of ordinary torts." Pet'r's App. C at 2–3.

2. In The Court of Appeals

After the jury found that Marathon did not discriminate against Motley, Motley appealed the district court discovery and evidentiary rulings to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the district court's rulings. Most importantly, the Tenth Circuit upheld the lower court's finding that the crime–fraud exception has not extended the privilege to include tortious conduct generally, but is limited to attorney advice in furtherance of a crime or fraud. Furthermore, the Tenth Circuit determined that Motley offered no evidence that the attorney participated in a crime or fraud; or that the two documents involved furthering a crime or fraud. The appellate court also affirmed the evidentiary ruling which Motley does not seek to reverse. *Motley*, 71 F.3d at 1553.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondent brings the following misstatements of facts contained in Motley's petition to the Court's attention.

Petitioner misrepresents to the Court, as she has done throughout this matter, that the privileged documents which she was denied were "**notes** regarding the activities of the Restructuring Oversight Committee." (Emphasis added) (Petition at 3). The privilege log clearly describes the document in question as "Lists." *Supra* at 4. Moreover, when Motley took the deposition of Miller prior to filing her motion to compel, she learned that none of the committee members retained documents of the ROC activities and that Miller did not take notes.

Petitioner also misrepresents to the Court that "Marathon did not contest the existence of a prima facie case of intention to commit a tort." (Petition at 3). Marathon argued that the privileged documents were for the purpose of legal advice and there was no evidence of intent to commit a tort.

Petitioner grossly misstates the district court's ruling when she states that the court did not conduct an *in camera* review because "an attorney's involvement in planning an intentional tort was shielded by the attorney–client privilege." (Petition at 4). The court held the crime–fraud exception to the attorney–client privilege "has not to date been extended . . . to communications made to further or plan the commission of a tort." (Pet'r's App. B at 2).

Petitioner misrepresents to the Court that Marathon was at fault because Motley did not discover earlier "explanations offered by Marathon for the exercise of its business judgment." (Petition at 4). As the appellate court noted, Motley did not begin discovery until less than two months before discovery cut-off. *Motley*, 71 F.3d at 1552. She did not depose witnesses until one week before discovery cut-off which was twenty-three days after the original discovery cut-off date.

Petitioner infers throughout her petition that Marathon's attorney advised the company to commit a tort and that a tort occurred. Her question for review is framed to suggest the attorney participated in the future planning of a tort and that a tort resulted. (Petition at 5). Such statements are absolutely without foundation in fact. There was no evidence that Marathon's attorney either advised his client or participated with his client in the planning or commission of a tort. There is no evidence that Miller or the ROC ever discussed that Motley was to be terminated or that the documents in questions were ever used in the decision to discharge Motley or eliminate the position which she held. Thus, in this case, petitioner cannot even support the assertion that a tort occurred or that Miller was involved..

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT WITH THE DECISIONS OF THE COURT

Petitioner erroneously asserts that the Tenth Circuit decision "appears" to conflict with two opinions of this Court, specifically, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1996, 85 L.Ed.2d 372 (1985) and *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989). Neither *Weintraub* nor *Zolin* held that the crime–fraud exception should be expanded to include torts.

In *Weintraub*, the Court ruled that a bankruptcy trustee could waive the attorney–client privilege with respect to communications that took place before the filing of the petition in bankruptcy. *Weintraub,* 105 S. Ct. at 1996. The opinion contains no mention of an expansion of the crime–fraud exception to include torts. Petitioner quotes from *Weintraub*, not the holding of the case or an opinion of the Court, but the argument of one party: "the corporation's attorney–client privilege . . . does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts." *Id.* at 1993–94. (Petition at 6). Petitioner, however, omits the *Weintraub* Court's response to the quoted argument: "The problem, however, is making the threshold showing of *fraud* necessary to defeat the privilege." *Weintraub*, 105 S. Ct. at 1994 (emphasis added). *Weintraub* is about fraud not torts.

The second case cited by petitioner, *Zolin,* concerned a criminal tax investigation. The Court held that an *in camera* inspection of allegedly privileged material may be made where there is sufficient evidence to support a reasonable belief that such a review may yield evidence that triggers the crime–fraud exception. *Zolin*, 109 S. Ct. at 2632. The *Zolin* court did not address expansion of the crime–fraud exception.

There is no conflict between the Tenth Circuit's opinion and the Court's decisions because the Court has not held that the crime–fraud exception applies to torts. Petitioner has no basis for certiorari under this theory.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner contends that certiorari should be granted because there is a conflict among the circuits as to whether the crime–fraud exception should be extended to include torts. Petitioner does not, however, establish that such a conflict exists. Petitioner cites **no** cases which have extended the crime–fraud exception to torts. Without such authority, petitioner has no conflict.

The seven circuit opinions which petitioner refers to do not create a conflict because they do **not** expand the crime–fraud exception. Petitioner does not cite these seven cases for their rulings. Instead, petitioner cites them merely because they quote a 1950 Massachusetts district court decision, *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). In *dicta*, the district court listed the elements of the attorney–client privilege

which included an element that the privilege does not apply to communications "for the purpose of committing a crime or tort." Neither *United Shoe* nor the seven cases cited by petitioner applies the crime–fraud exception to anything but criminal conduct or fraud:

(1) *In re Sealed Case*, 737 F.2d 94, 101 n.11 (D.C. Cir. 1984), concerned criminal allegations in a grand jury investigation and the privilege was allowed where the information was confidential legal advice and not "in furtherance of a crime."

(2) In *Rhone–Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994), the parameters of the crime–fraud exception were not addressed. Instead, the court held that the attorney–client privilege was not waived by putting state of mind at issue. *Id.* at 866.

(3) *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984), involved criminal allegations in a grand jury investigation and the privilege was denied because confidentiality was not intended.

(4) *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979), did not apply the crime–fraud exception; the privilege was denied because employees interviewed by the attorney were not in the control group.

(5) In *United States v. Fortna*, 796 F.2d 724, 730–31 (5th Cir. 1986), *cert. denied*, 479 U.S. 950, 107 S. Ct. 437, 93 L.Ed.2d 386, the defendant was convicted of conspiracy to import cocaine; the case was remanded to allow the

defendant the opportunity to prove that his communications with counsel were confidential and did not concern the alleged crime.

(6) As to *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982), the privilege was denied because the subpoenaed documents concerned marijuana smuggling.

(7) In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) the crime–fraud exception was not addressed; the attorney–client privilege was denied because the information was not confidential and it concerned business, rather than legal, advice.

There is no conflict among the circuits on this issue. Courts from each of the federal circuits define the crime–fraud exception in terms of criminal conduct or fraud. *United States v. Richard Roe, Inc.* 68 F.3d 38, 40 (2d Cir. 1995) (to invoke crime–fraud exception, a party must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and communications were in furtherance thereof); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1416 (11th Cir. 1994) (exception requires that attorney's communication further criminal or fraudulent activity); *Sandberg v. Virginia Bankshares, Inc.*, 979 F. 2d 332 (4th Cir. 1992) (under crime–fraud exception, communications with attorney for purpose of perpetrating or facilitating crime or fraud in the future are not privileged); *United States v. De La Jara*, 973 F.2d 746, 748 (9th Cir. 1992) (to successfully invoke crime–fraud exception, party must make prima facie showing that attorney was retained in order to promote

intended or continuing criminal or fraudulent activity); *United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 661, 121 L.Ed.2d 587 (crime-fraud exception applied because there was prima facie evidence that defendant's communications with counsel concerned his criminal activities); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (communication is unprotected by the privilege if it gives direction for commission of future fraud or crime); *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992) (attorney-client privilege does not apply to legal advice in aid of fraudulent scheme or crime; there was evidence of securities fraud); *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.*, 869 F.2d 1155, 1161-62 (8th Cir. 1989), *cert. denied*, 493 U.S. 848, 110 S. Ct. 145, 107 L.Ed.2d 104 (exception did not apply because party failed to make a prima facie showing that communication was in furtherance of a fraud and communication bore a close relationship to the fraud); *In re Grand Jury Proceedings*, 857 F. 2d 710, 712 (10th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3214, 106 L.Ed.2d 565 (1989) (attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud); *In re Appl'n of United States*, 723 F.2d 1022, 1026 (1st Cir. 1983) (communications which concern illegal activities are not protected by privilege; case involved suspected criminal activity); *United States v. Mardian*, 546 F.2d 973, 982 (D.C. Cir. 1976) (attorney-client privilege does not extend to communications which are in aid of crime or fraud)[1]; *United*

---

[1] In two cases from the D.C. Circuit, the court used the language "crime, fraud or other misconduct." Both, however, involved allegations of criminal conduct and neither

States v. Aldridge, 484 F. 2d 655, 658 (7th Cir. 1973), *cert. denied sub nom Good v. United States*, 415 U.S. 921, 94 S.Ct. 1423, 39 L.Ed.2d 477 (1974) (privilege does not apply to communications made in furtherance of continuing or future fraud or crime).

In order to support certiorari, a conflict between the circuits must be a real and direct conflict as to the law, not merely an inconsistency in *dicta*. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 51 S. Ct. 214 (1931) (asserted conflict in decisions arises from factual differences and not in the application of principle of law; writ of certiorari dismissed as improvidently granted); *Keller v. Adams-Campbell Co.*, 264 U.S. 314, 44 S. Ct. 356 (1924) (close examination of court of appeals' decisions reveals no conflict; writ of certiorari dismissed, at the costs of petitioner).

Petitioner cannot establish a conflict because she cites no circuit cases which have extended the crime-fraud exception to torts. Petitioner's reliance upon the treatise, 8 Wigmore, Evidence § 2298, 573 (1961), is not enough. A conflict among commentators cited in the treatise does not support certiorari. Petitioner's writ should be denied.

---

extended the crime-fraud exception to include torts. *United States v. White*, 887 F. 2d 267, 271 (D.C. Cir. 1989) (exception not applied because communication did not "further a crime or fraud") and *In re Sealed Case*, 754 F. 2d 395, 399 (D.C. Cir. 1985) (in context of grand jury investigation of tax fraud and destruction of evidence, crime-fraud exception applied because there was ample evidence that communications aided the "illegal and fraudulent scheme").

III.

THERE IS NO CONFLICT WITH STATE LAW

Petitioner pleaded a state law claim as well as a federal statutory cause of action. Under Federal Rules of Evidence, state privilege law applies to state claims. 28 U.S.C. § 501. The Tenth Circuit considered Motley's arguments under both Oklahoma and federal privilege law and concluded that the crime–fraud exception is triggered by a crime or fraud and not by ordinary torts.

The Tenth Circuit's application of Oklahoma law to the state cause of action is correct. Citing *White v. American Airlines, Inc.*, 915 F.2d 1414, 1424 (10th Cir. 1990), the court stated "[w]e have held that 'some type of prima facie showing of a crime or fraud is required under Oklahoma law in order to trigger the applicability of the crime–fraud exception.'" *Motley*, 71 F.3d at 1551. Oklahoma has a comprehensive statute on attorney–client privilege. Okla. Stat. tit. 12, § 2502 (1994). That statute provides, in part, that

> D. There is no privilege under this rule:
>
> > 1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

The statute does not mention torts as providing an exception to the attorney–client privilege. Oklahoma applies the crime–fraud exception only where the conduct is clearly a crime or

fraud. *See Keller v. State*, 651 P.2d 1339, 1342 (Okla. Crim. App. 1982) (murder); *Cole v. State*, 298 P. 892, 895 (Okla. Crim. App. 1931) (murder); *Morris v. State*, 115 P. 1030, 1037 (Okla. Crim. App. 1911) (felony of creating false document for use at trial).

Where both state and federal claims are pursued in a federal forum, if state privilege law is consistent or compatible with federal privilege law, the two should be read together in order to accommodate the legitimate expectations of the state's citizens. *Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993). Where a court can harmonize the provisions of state privilege law with federal discovery law, then the state law should be followed. *Id.* at 688. The principles of comity between state and federal sovereignties also compel federal courts to recognize state privilege law where this can be accomplished at no substantial cost to federal substantive and procedural policy. *Smith v. Alice Peck Day Mem. Hosp.*, 148 F.R.D. 51, 54 (D. N.H. 1993) *citing United States v. King*, 73 F.R.D. 103, 105 (E.D. N.Y. 1976); *Wei v. Bodner*, 127 F.R.D. 91, 95 (D. N.J. 1989) (state privilege should be considered in federal question cases by balancing the need for discovery against the importance of the policies behind the privilege).

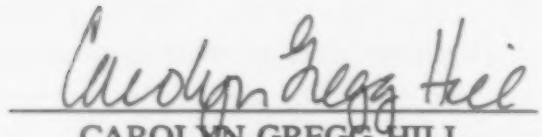
Oklahoma law should neither be ignored nor changed. To expand the crime–fraud exception to the attorney–client privilege to include torts and civil rights claims would be an unwarranted alteration of Oklahoma law. *See Hyde Constr. Co. v. Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972) (court declined to expand crime–fraud exception to include

torts because there was no state law decision on the issue and to do so would be a considerable expansion of state law).

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.

Respectfully submitted,



CAROLYN GREGG HILL
Counsel of Record
SHELIA D. TIMS
of
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241
Telecopier: (405) 235-8786

Attorneys for Respondent
MARATHON OIL COMPANY